

FILED BY CLERK

FEB 17 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0319-PR
)	DEPARTMENT B
)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JEFFREY SCOTT ROBERTS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20020995

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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By Jacob R. Lines

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V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Jeffrey Roberts seeks review of the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., in which he asserted the court had improperly determined the aggravating and mitigating

circumstances at sentencing. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Roberts has not sustained his burden of establishing such abuse here.

¶2 In 2002, the state charged Roberts with first-degree murder, conspiracy to commit armed robbery, and attempted armed robbery. After his jury trial began, Roberts pled guilty to second-degree murder in exchange for the dismissal of the other charges against him. The trial court sentenced him to an aggravated, eighteen-year prison term. He then filed a notice and petition for post-conviction relief pursuant to Rule 32, which the court granted based on the fact that Roberts had been sentenced in violation of the standards set forth in *Blakely v. Washington*, 542 U.S. 296 (2004). The court also granted Roberts leave to file a petition for review in this court to address whether it had erred in ruling a jury could be empanelled to determine the aggravating factors for sentencing. This court denied relief on the petition, concluding a jury could be empanelled. Roberts waived his right to a jury trial on aggravating factors and the trial court imposed the same aggravated, eighteen-year prison term.

¶3 Apparently pursuant to a cooperation agreement with the state, Roberts’s conviction was then set aside and Roberts entered a new plea agreement, pursuant to which he pled guilty to manslaughter. At sentencing, the trial court again imposed an aggravated, eighteen-year term of imprisonment. It found the following mitigating circumstances had been established: no prior criminal history, family support, remorse, age at the time of the offense, and attempts to rehabilitate while in prison. And it

concluded the following aggravating circumstances had been proven: the offense was committed for pecuniary gain, the offense was committed with accomplices, use of drugs at the time of the offenses, and that Roberts had been the one “that took the gun into the house and . . . threatened [the victim] by pointing the gun at his head.”

¶4 Roberts then petitioned for post-conviction relief, arguing the trial court had “erred in finding [his] alcohol and drug use around the time of the offenses to be an aggravating factor instead of a statutory mitigating factor” and “in failing to find [his] cooperation with the state,” along with various other facts asserted, “to be mitigating factors.” The court summarily denied relief. In regard to Roberts’s claim that it should have considered additional mitigating factors, the court concluded Roberts had failed to “assert any Rule 32.1 grounds for relief that applied to [his] claims.” And, as to his claim that the trial court wrongfully considered his drug and alcohol use as an aggravating factor, rather than as a mitigating factor, the court concluded Roberts had failed to show he would have received a different sentence absent the alleged error relating to the aggravating circumstance of “impaired capacity.”

¶5 On review, Roberts argues the trial court abused its discretion in dismissing his petition as outside the scope of relief available under Rule 32. And he argues the court abused its discretion in rejecting his arguments that it should have considered other factors, including his alleged “impaired capacity,” in mitigation.

¶6 First, we agree with Roberts that the trial court erred in concluding that “[n]one of the specific grounds for relief under Rule 32 appl[ies] to [his] assertion that [the] Court should have found more mitigators under the . . . catchall provision.” In *State*

v. Cazares, 205 Ariz. 425, ¶ 4, 72 P.3d 355, 356 (App. 2003), this court concluded that Rule 32.1(c) “encompasses a claim that a sentence was not imposed in compliance with the relevant sentencing law, at least for a sentence imposed on a pleading defendant.”¹ Construing Rule 32.1(c) liberally, as we must, *see id.*, we conclude that a claim the trial court abused its discretion in not considering “[a]ny other factor that is relevant . . . and that the court finds to be mitigating” under A.R.S. § 13-701(E)(6), could merit relief under that rule. But, although the trial court relied in part on erroneous grounds in denying relief on this claim, Roberts has not established that the court abused its discretion in summarily dismissing his petition.

¶7 As we also pointed out in *Cazares*,

A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits, as petitioner’s is, unless it clearly appears that the court abused its discretion. We will find an abuse of sentencing discretion only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing. Provided the trial court fully considers the factors relevant to imposing sentence, we will generally find no abuse of discretion.

¹Although Roberts relies on *Cazares* on review, he did not cite that case in his petition below or in his reply to the state’s answer to the petition in which it asserted that his “claim does not fall within the scope of remedies under Rule 32.1.” He did, however, cite *State v. Baca*, in his reply, which suggests his claim would fall within the grounds of Rule 32.1(c). 187 Ariz. 61, 65-66, 926 P.2d 528, 532-33 (App. 1996) (if defendant’s allegation trial court had “failed to consider substantial mitigating circumstances” were true, resulting sentence “not in accordance with the sentence authorized by law” under Rule 32.1(c)), *quoting* Ariz. R. Crim. P. 32.1(c).

Cazares, 205 Ariz. 425, ¶ 6, 72 P.3d at 357 (citations omitted). Roberts has not established the trial court “acted arbitrarily or capriciously” or failed to “fully consider” the relevant factors at sentencing. *Id.*

¶8 Additionally, “a sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented.” *Id.* ¶ 8. Here, Roberts has not established the trial court abused its discretion in weighing any of the factors asserted. *See id.* And, as the court concluded in regard to his second claim of error, because he has not shown that, if true, his allegations “might have changed the outcome,” Roberts has not stated a colorable claim for relief. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Therefore, although we grant the petition for review, we deny relief.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge